IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 8, 2009 Session

MITZI BAYNE RUTH, ET AL. v. HOME HEALTH CARE OF MIDDLE TENNESSEE, LLC, ET AL.

Appeal from the Chancery Court for Bradley County
No. 07-284 Jerri S. Bryant, Chancellor

No. E2009-00845-COA-R3-CV - Filed March 3, 2010

Mitzi Bayne Ruth, executrix of the Estate of Fred W. Bayne ("Executrix"), the Estate of Fred W. Bayne ("the Estate"), and Home Health Care of East Tennessee, Inc. ("HHC East") sued Home Health Care of Middle Tennessee, LLC ("the Company") and B. Fred Allred, III ("Allred") seeking, among other things, a declaratory judgment that Fred W. Bayne's death was an event triggering dissolution of the Company. Both plaintiffs and defendants filed motions for partial summary judgment. After a hearing, the Trial Court entered an order granting plaintiffs' motion for partial summary judgment finding and holding, *inter alia*, that Fred W. Bayne's death was a liquidating event triggering the dissolution of the Company pursuant to the Company's Operating Agreement, and that Allred did not have the right pursuant to the Operating Agreement to purchase Fred W. Bayne's membership interest and continue the Company business. The Company and Allred appeal to this Court. We hold that the Operating Agreement was ambiguous, vacate the award of partial summary judgment, and remand to the Trial Court for further proceedings consistent with this Opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Robert S. Stone, Knoxville, Tennessee, for the appellants, Home Health Care of Middle Tennessee, LLC, and B. Fred Allred, III.

C. Crews Townsend and Thomas E. Hayes, Chattanooga, Tennessee, for the appellees, Mitzi Bayne Ruth, executrix of the Estate of Fred W. Bayne; the Estate of Fred W. Bayne; and Home Health Care of East Tennessee, Inc.

OPINION

Background

The Company was formed as a Tennessee limited liability company in 2001 with Allred holding 100% of both the governance rights, and the financial rights or interests. In January of 2002, Allred and Fred W. Bayne entered into an Amendment to Operating Agreement of Home Health Care of Middle Tennessee, L.L.C. ("the Operating Agreement"), which allowed Fred W. Bayne to acquire a membership interest in the Company, and amended and ratified the Company's original operating agreement. Per the Operating Agreement, Allred had a 50% membership interest in the Company, and Fred W. Bayne had a 50% membership interest.

In 2007, Fred W. Bayne died. Allred then attempted to purchase Fred W. Bayne's membership interest in the Company from the Estate pursuant to Section 12.1(e) of the Operating Agreement. The Executrix asserted that Fred W. Bayne's death had triggered a dissolution of the Company, and that Allred did not have the right to purchase Fred W. Bayne's membership interest pursuant to Section 12.1(e).

In pertinent part, the Operating Agreement provides:

> DISSOLUTION AND WINDING UP
>
> 12.1 Liquidating Events. The Company shall dissolve and commence winding up and liquidating upon the first to occur of any of the following ("Liquidating Events"):
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> (a) December 31, 2050;
> (b) The sale of all or substantially all of the Property;
> (c) The vote by Members holding two-thirds or more of the Membership Interests to dissolve, wind up, and liquidate the Company;
> (d) The happening of any other event that makes it unlawful, impossible, or impractical to carry on the business of the Company; or
> (e) Upon the death, withdrawal, expulsion, bankruptcy, or dissolution of a Member or the occurrence of any other event that terminates the continued membership of a Member in the Company.
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> The Members hereby agree that, notwithstanding any provision of the Act, the Company shall not dissolve prior to the occurrence of a Liquidating

Event. Furthermore, if an event specified in Section 12.1(e) hereof occurs, the remaining Members may, within ninety (90) days of the date such event occurs, by Majority Interest vote by Majority Interest [sic] elect a successor Member and continue the Company business or purchase such Member's entire Membership Interest for the "Purchase Price" as defined hereinafter, in which case the Company shall not dissolve. If it is determined, by a court of competent jurisdiction, that the Company has dissolved (i) prior to the occurrence of a Liquidating Event, or (ii) upon the occurrence of an event specified in Section 12.1(e) hereof following which the members elect a successor member pursuant to the previous sentence, the Members hereby agree to continue the business of the Company without a winding up or liquidation. The Purchase Price for purposes of Section 12.1(e) hereof for such Member's Membership Interest shall be the "Capital Account" of such Member in the Company on the last day of the month in which the such Section 12.1(e) event occurred as determined by the ususal and customary independent accountants for the Company using generally accepted counting [sic] principles.

The Operating Agreement defines the relevant terms as follows:

(f) "Capital Account" means, with respect to any Member, the Capital Account maintained for such Member in accordance with the following provisions:

(i) To each Person's Capital Account there shall be credited such Person's Capital Contributions, such Person's distributive share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Section 10 or Section 3.3 hereof, and the amount of any Company liabilities assumed by such Person or which are secured by any Property distributed to such Person.

(ii) To each Person's Capital Account there shall be debited the amount of cash and the Gross Asset Value of any Property distributed to such Person pursuant to any provision of this Agreement, such Person's distributive share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Section 3.2 or Section 3.3 hereof, and the amount of any liabilities of such Person assumed by the Company or which are secured by any property contributed by such Person to the Company.

(iii) In the event all or a portion of an interest in the Company is

transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the transferred interest.

(iv) In determining the amount of any liability for purposes of Sections 1.10(b)(i), 1.10(b)(ii), 1.10(f)(i) and 1.10(f)(ii) hereof, there shall be taken into account Code Section 752(c) and any other applicable provisions of the Code and Regulations.

The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulations Section 1.704-1(b), and shall be interpreted and applied in a manner consistent with such Regulations. In the event the Members shall determine that it is prudent to modify the manner in which the Capital Accounts, or any debits or credits thereto (including, without limitation, debits or credits relating to liabilities which are secured by contributions or distributed property or which are assumed by the Company or Members), are computed in order to comply with such Regulations, the Members may make such modification, provided that it is not likely to have a material effect on the amounts distributed to any Person pursuant to Section 12 hereof upon the dissolution of the Company. The Members also shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and the amount of Company capital reflected on the Company's balance sheet, as computed for book purposes, in accordance with Regulations Section 1.704-1(b)(2)(iv)(q), and (ii) make any appropriate modifications in the event unanticipated events (for example, the acquisition by the Company of oil or gas properties) might otherwise cause this Agreement not to comply with Regulations Section 1.704-1(b).

* * *

(h) "Capital Interest" means the proportion that a Member's positive Capital Account bears to the aggregate Capital Accounts of all Members whose Capital Accounts have positive balances as may be adjusted from time to time.

* * *

(q) "Majority Interest" means one or more Membership Interests of Members which taken together equal or exceed 51% of the aggregate of all

Capital Interests.

* * *

(s) "Member" means each of the parties who executes this Operating Agreement as a Member and each of the parties who may hereafter become Members. To the extent a Manager has purchased Membership Interests in the Company, he will have all the rights of a Member with respect to such Membership Interests, and the term "Member" as used herein shall include Manager to the extent he has purchased such Membership Interests in the Company.

(t) "Membership Interest" means ownership interest in the Company, including any and all benefits to which the holder of such Membership Interest may be entitled as provided in this Agreement, together with all obligations of such Person to comply with the terms and provisions of this Agreement. Interests shall be characterized by fixed percentages initially set forth in Section 2.

The Executrix, the Estate, and HHC East, another business interest of Fred W. Bayne's, sued the Company and Allred seeking, among other things, a declaration that the death of Fred W. Bayne had triggered a dissolution of the Company. Both plaintiffs and defendants filed motions for partial summary judgment. After a hearing, the Trial Court entered an order on March 2, 2009, finding and holding, *inter alia*, that Fred W. Bayne's death was a liquidating event triggering the dissolution of the Company pursuant to the Company's Operating Agreement, and that Allred did not have the right to purchase Fred W. Bayne's membership interest pursuant to Section 12.1(e). Remaining issues in the case were tried and the Trial Court entered a Final Judgment on April 1, 2009 incorporating by reference its March 2, 2009 order. The Company and Allred appeal the Trial Court's grant of partial summary judgment to plaintiffs.

Discussion

Although the Company and Allred raise three issues on appeal, the dispositive issue is whether the Trial Court erred in granting partial summary judgment to plaintiffs by holding that Fred W. Bayne's death triggered a dissolution of the Company pursuant to the Operating Agreement, and that Allred did not have the right to purchase Fred W. Bayne's membership interest pursuant to Section 12.1.(e) and continue the business of the Company.

Our Supreme Court reiterated the standard of review in summary judgment

cases as follows:

> The scope of review of a grant of summary judgment is well established. Because our inquiry involves a question of law, no presumption of correctness attaches to the judgment, and our task is to review the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Cent. S.*, 816 S.W.2d 741, 744 (Tenn. 1991).
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> A summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The party seeking the summary judgment has the ultimate burden of persuasion "that there are no disputed, material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law." *Id*. at 215. If that motion is properly supported, the burden to establish a genuine issue of material fact shifts to the non-moving party. In order to shift the burden, the movant must either affirmatively negate an essential element of the nonmovant's claim or demonstrate that the nonmoving party cannot establish an essential element of his case. *Id*. at 215 n.5; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008). "[C]onclusory assertion[s]" are not sufficient to shift the burden to the non-moving party. *Byrd*, 847 S.W.2d at 215; *see also Blanchard v. Kellum*, 975 S.W.2d 522, 525 (Tenn. 1998). Our state does not apply the federal standard for summary judgment. The standard established in *McCarley v. West Quality Food Service*, 960 S.W.2d 585, 588 (Tenn. 1998), sets out, in the words of one authority, "a reasonable, predictable summary judgment jurisprudence for our state." Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee*, 69 Tenn. L. Rev. 175, 220 (2001).
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> Courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). In making that assessment, this Court must discard all countervailing evidence. *Byrd*, 847 S.W.2d at 210-11. Recently, this Court confirmed these principles in *Hannan*.

Giggers v. Memphis Hous. Auth., 277 S.W.3d 359, 363-64 (Tenn. 2009).

The Trial Court interpreted the contract at issue in this case, i.e., the Operating Agreement. As this Court explained in *Kafozi v. Windward*:

> In resolving a dispute concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 889-90 (Tenn. 2002)(citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999)). A determination of the intention of the parties "is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide." *Planters Gin Co.*, 78 S.W.3d at 890 (citing 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998); *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001)). The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. *Planters Gin Co.*, 78 S.W.3d at 890. The parties' intent is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." *Id*. (quoting 17 Am. Jur. 2d, *Contracts*, § 245).
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> This Court's initial task in construing the Contract at issue is to determine whether the language of the contract is ambiguous. *Planters Gin Co.*, 78 S.W.3d at 890. If the language is clear and unambiguous, the literal meaning of the language controls the outcome of the dispute. *Id*. A contract is ambiguous only when its meaning is uncertain and may *fairly* be understood in more than one way. *Id.* (emphasis added). If the contract is found to be ambiguous, we then apply established rules of construction to determine the intent of the parties. *Id*. Only if ambiguity remains after applying the pertinent rules of construction does the legal meaning of the contract become a question of fact. *Id*.

Kafozi v. Windward Cove, LLC, 184 S.W.3d 693, 698-99 (Tenn. Ct. App. 2005).

Although the Trial Court found that the Operating Agreement was unambiguous, we disagree. The Operating Agreement is particularly ambiguous in that it requires a vote by Majority Interest to overcome a dissolution and Majority Interest is defined in terms of Membership Interests of Members in relation to Capital Interests, which are in turn defined with reference to Capital Accounts. Thus, the definitions in the Operating

Agreement are convoluted, inextricably intertwined, and subject to fairly being understood in more than one way.

Given that the Operating Agreement is ambiguous, the ultimate issue in this case, which is what was the intent of the parties to the Operating Agreement, becomes a disputed factual issue. Therefore, summary judgment was not proper on the issue of whether Allred had the right to purchase Fred W. Bayne's membership interest pursuant to Section 12.1(e) thereby stopping the dissolution triggered by the death of Fred W. Bayne. We vacate the grant of partial summary judgment to plaintiffs incorporated into the Trial Court's April 1, 2009 Final Judgment and remand this case to the Trial Court for further proceedings consistent with this Opinion in order to determine the intent of the parties to the ambiguous Operating Agreement, and whether a dissolution of the Company is required pursuant to the Operating Agreement.

Conclusion

The judgment of the Trial Court is vacated and this case is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the appellees, Mitzi Bayne Ruth, executrix of the Estate of Fred W. Bayne; the Estate of Fred W. Bayne; and Home Health Care of East Tennessee, Inc.

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D. MICHAEL SWINEY, JUDGE